**PP**

**v.**

**SHARMA KUMARI**

HIGH COURT MALAYA, KUALA LUMPUR

AUGUSTINE PAUL J

[CASE NO: 41-201-99]

10 APRIL 2000

***CRIMINAL LAW:*** *Penal Code - Section 199 - Making false statement - Ingredients of offence - Whether statements made by accused were indeed false - Whether accused knew it to be false*

***CRIMINAL LAW:*** *Penal Code - Section 199 - Making false statement - False statement contained in declaration - Whether necessary to prove that declaration was used - Rules of the High Court 1980, O. 41*

***CRIMINAL PROCEDURE:*** *Jurisdiction of court - Lack of - Whether charge should be instituted on complaint of High Court - Whether previous sanction of Public Prosecutor sufficient - Criminal Procedure Code, s. 129*

***EVIDENCE:*** *Witness - Credibility of - Whether witness had interest in case - Whether care and attention had to be exercised in accepting evidence of witness*

The charges preferred against the accused were based on s. 199 of the Penal Code – for allegedly making false declarations in affidavits filed in an earlier civil suit against her. In the affidavits the accused known as Sharma Kumari had denied that the name "Sharma Kumari Shukla" referred to her.

One of the objections before the magistrate was that the court had no jurisdiction to proceed with the charges as they were not instituted on the complaint of the High Court before which the false declarations were used pursuant to s. 129 of the Criminal Procedure Code ('CPC'). The magistrate was also of the opinion that the prosecution had failed to prove the following ingredients of the offence, namely: (a) that the declarations made by the accused were indeed false; (b) that the statements touched a point material to the object of the declarations; (c) that when making such false statements, the accused knew them to be false, or believed them to be false, or did not believe them to be true. The magistrate also felt that due care and attention had to be exercised in accepting the evidence of PW7, as he was counsel representing PW1 (the complainant) in the earlier civil suit and therefore he had an interest in the case.

At the close of the case for the prosecution the magistrate found that the prosecution had not made out a *prima facie* case and accordingly acquitted and discharged the accused. The prosecution appealed.

**Held:**

**[1]** The complaint of a court as contemplated by s. 129(1)(b) CPC is only an alternative procedure for instituting a prosecution in respect of the offences specified in the sub-section in the sense that a prosecution in respect of such offences may also be instituted with the previous sanction of the public prosecutor.

**[1a]** The opening words of s. 129(1) CPC, that is to say, "except in the case of complaints laid by the public prosecutor no court shall take cognisance" mean that where the complaint is laid by the public prosecutor the remaining parts of the section become inapplicable.

**[1b]** Further the absence of a comma before the word 'or' separating the two parts of s. 129(1)(b) CPC means that both parts must be construed conjunctively with the result that both parts are alternatives to the institution of a prosecution in respect of the offences enumerated in the sub-section.

**[1c]** In any event, s. 129(1)(b) CPC should not be construed in a way that would impinge upon the powers of the Attorney General bestowed by art. 145(3) of the Federal Constitution.

**[2]** It was the function of the court to ascertain what the accused meant by the words used. In para 2 of her affidavit, the accused denied that she was known by the alternative name of Sharma Kumari Shukla. The prosecution however had led evidence to show that the accused was known by the name of Sharma Kumari Shukla. The averment by the accused that she was not the person described as Sharma Kumari Shukla had been proved by the prosecution to be a false declaration.

**[3]** The learned magistrate ought to have to identified evidence from the testimony of PW7 to show that there was a strong likelihood of him being biased before embarking on the premise that he had an interest in the case. The facts of the case had shown that the evidence of PW7 had been unchallenged. The magistrate therefore had impugned the credibility of PW7 on wrong principles.

**[4]** The offence under the section consists only of the making of a declaration where a false statement has been made. The declaration need not have been used in order to attract the sanction of the section. It is only necessary to prove that the declaration is receivable as evidence. An affidavit is a declaration within the meaning of the section as it is receivable as evidence of the fact declared therein pursuant to O. 41 of the Rules of the High Court 1980. Thus it was only necessary for the prosecution to prove that a declaration (exhs P8 and P9) was made by the accused. There was no requirement to show that such exhibits were used during the hearing of the civil suit.

**[5]** The fact that a person when making a false statement knows or believes it to be false raises the question of his intention. The deliberate intention with which the accused made the false statement was amply supported by the evidence. Moreover the evidence on record did not show that the accused took any steps immediately or soon thereafter to admit that such an averment was a mistake. This ingredient therefore had been proved by the prosecution.

*[Defence called on both charges.]*

**Case(s) referred to:**

*Alliedbank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33* ***(refd)***
*Aminah v. Superintendent of Prison, Pengkalan Chepa, Kelantan [1968] 1 MLJ 92* ***(refd)***
*Assa Singh v. Menteri Besar, Johore [1969] 2 MLJ 30* ***(refd)***
*Dato' Mohamed Hashim Shamsuddin v. A-G Hongkong [1986] 2 MLJ 112* ***(refd)***
*Datuk Mahinder Singh v. PP [1987] 2 CLJ 39* ***(refd)***
*Johnson Tan Han Seng v. PP [1977] 2 MLJ 66* ***(refd)***
*Goh Gok Hoon v. Abdul Hamid & Anor [1967] 1 MLJ 36* ***(refd)***
*Government of Malaysia v. Iznan Osman [1977] 2 MLJ 1* ***(refd)***
*Great Western Railway v. Bristol Corporation [1918] 87 LJ Ch 414* ***(refd)***
*Kyohei Hosoi v. PP [1998] 1 CLJ 1063* ***(refd)***
*Lee Seow Kuan v. R [1940] MLJ 211* ***(refd)***
*Long Samat v. PP [1974] 2 MLJ 152* ***(refd)***
*Low Moh & Anor v. PP [1954] MLJ 14* ***(refd)***
*Minister of Home Affairs v. Chu Choon Yong [1977] 2 MLJ 20* ***(refd)***
*PP v. Lee Ee Teong [1953] MLJ 244* ***(refd)***
*Prithipal Singh v. Datuk Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, Intervener) [1993] 3 MLJ 336* ***(refd)***
*Repco Holdings Bhd v. PP [1997] 4 CLJ 740* ***(refd)***
*Surinder Singh Kanda v. Government of the Federation of Malaya [1962] MLJ 169* ***(refd)***
*Velumailum v. PP [1947] MLJ 152* ***(refd)***
*Yeap Hock Seng v. Minister of Home Affairs, Malaysia [1975] 2 MLJ 279* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, s. 129(1)(b)
Evidence Act 1950, s. 114
Federal Constitution, arts. 4(1), 145(3), 160, 162(1), (6)
Penal Code, s. 199
Rules of the High Court 1980, O. 32 r. 13(1), O. 41

**Other source(s) referred to:**
*Dr Sir Hari Singh Gour's Penal Law of India,* 10th edn, vol 2, pp 1621, 1688
*Ratanlal & Dhirajlal's Law of Crimes,* 24th edn, vol I, pp 853, 854

*For the appellant - Salehuddin Saidin DPP*
*For the respondent - Gurbachan Singh; M/s Bachan & Kartar*

*Reported by Mariette Peters-Goh*

## JUDGMENT

**Augustine Paul J:**

The charges preferred against Sharma Kumari ("the accused") arise from Kuala Lumpur High Court Civil Suit No S2-22-594-97 ("the civil suit") filed by one Dato' Abdullah Hishan bin Hj Mohd Hashim against her in the name of Sharma Kumari Shukla as defendant. After the commencement of the civil suit the accused affirmed and filed in court two affidavits, that is to say, one dated 30 October 1998 (exh. P8) and one dated 2 December 1998 (exh. P9) in reply to a summons-in-chambers in the civil suit. Dato' Abdullah Hishan bin Hj Mohd Hashim lodged a police report (exh. P10) against the accused in respect of the two affidavits affirmed by her. Paragraphs 2 of both the affidavits ("para. 2") form the subject matter of both the charges against the accused. The two charges read as follows:

**First Charge**

> Bahawa kamu pada 30.10.1998 di Mahkamah Tinggi Sivil 2, Kuala Lumpur dalam Wilayah Persekutuan, di dalam sebuah akuan yang dibuat oleh kamu yang boleh diterima di sisi undang-undang oleh Mahkamah tersebut sebagai keterangan iaitu satu afidavit yang didaftarkan di Mahkamah tersebut, telah membuat pernyataan palsu dalam afidavit tersebut sebagaimana yang digariskan dalam lampiran 'A1' yang dilampirkan bersama dan pernyataan palsu tersebut adalah berkenaan dengan satu perkara material kepada tujuan afidavit tersebut dan pernyataan palsu tersebut kamu tahu atau percaya adalah palsu atau tidak percaya sebagai benar. Oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 199 Kanun Keseksaan yang boleh dihukum di bawah cabang pertama kepada seksyen 193 Kanun yang sama.

**Second Charge**

Bahawa kamu pada 3.12.1998 di Mahkamah Tinggi Sivil 2, Kuala Lumpur dalam Wilayah Persekutuan, di dalam sebuah akuan yang dibuat oleh kamu yang boleh diterima di sisi undang-undang oleh Mahkamah tersebut sebagai keterangan iaitu satu afidavit yang didaftarkan di Mahkamah tersebut, telah membuat pernyataan palsu dalam afidavit tersebut sepertimana yang digariskan dalam lampiran 'A2' yang dilampirkan bersama dan pernyataan palsu tersebut adalah berkenaan dengan satu perkara material kepada tujuan afidavit tersebut dan pernyataan palsu tersebut kamu tahu atau percaya adalah palsu atau tidak percaya sebagai benar. Oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 199 Kanun Keseksaan yang boleh dihukum di bawah cabang pertama kepada seksyen 193 Kanun yang sama.

The material parts of lampiran A1 (exh. P8) referred to in the first charge read as follows:

Saya, SHARMA KUMARI A/P OAM PARKASH (p) (KPDN No. 5932395) yang beralamat di No. 9, Lorong Tempinis Kanan 3, Lucky Gardens, Bangsar, Kuala Lumpur secukup umur dengan sesungguh dan sebenarnya mengakui bahawa:-

1. Saya mengatakan disini perkara-perkara didalam pengetahuan saya sendiri melainkan apa yang dinyatakan sebaliknya.

2. Saya mengikrarkan afidavit disini tanpa prasangka untuk menimbulkan bantahan-bantahan fakta bahawa saya bukan orang seperti yang digambarkan dalam tindakan disini sebagai Defendan.

3. Saya memohon kebenaran kepada afidavit Dato' Abdullah Hishan bin Hj. Mohd Hashim yang diikrarkan pada 13.10.1998 tetapi diserahkan kepada peguam saya pada 16.10.1998. Saya dinasihatkan oleh peguam saya bahawa penyerahan ini adalah diluar jangka masa.

4. Saya mengikrarkan afidavit ini tanpa prasangka kepada bantahan-bantahan awal yang dimaksudkan ditimbulkan terhadap afidavit Plaintif.

5. Mengenai perenggan 3 dalam afidavit tersebut tiada apa-apa afidavit yang diikrarkan dan difailkan pada 29.9.1998 oleh sesiapa yang dinamakan didalamnya. Saya dinasihatkan oleh peguam saya dan percaya sepenuhnya bahawa afidavit Plaintif adalah dalam hal demikian cacat dan salah.

6. Peguam saya juga telah memberitahu saya bahawa mereka telah diserahkan dengan sesalinan Saman Dalam Kamar yang tidak bermeterai dan tidak bertarikh pada 27.10.1998 dimana Plaintif mencari satu lanjutan masa untuk penyerahan afidavit-afidavitnya yang diikrarkan pada 5.8.1998 dan 13.10.1998. Saya dinasihatkan oleh peguam saya bahawa saya berhak tidak memberi jawapan kepada afidavit Plaintif yang diikrarkan pada 13.10.198 jika Mahkamah Mulia ini membenarkan lanjutan masa yang dicari itu.

7. Oleh yang demikian saya berdoa bahawa permohonan Plaintif untuk Injunksi Interim dibuang dengan kos dan Perintah bertarikh 6.8.1998 diketepikan dengan kos.

The material parts of lampiran A2 (exh. P9) referred to in the second charge read as follows:

Saya, SHARMA KUMARI A/P OAM PARKASH (p) (KPDN No. 5932395) yang beralamat di No. 6, Lorong Tempinis Kanan 3, Lucky Gardens, Bangsar, Kuala Lumpur secukup umur dengan sesungguh dan sebenarnya mengakui bahawa:-

1. Saya mengatakan disini perkara-perkara didalam pengetahuan saya sendiri melainkan apa yang dinyatakan sebaliknya.

2. Saya mengikrarkan afidavit disini tanpa prasangka untuk menimbulkan bantahan-bantahan fakta bahawa saya bukan orang seperti yang digambarkan dalam tindakan disini sebagai Defendan.

3. Saya dinasihatkan oleh peguam saya bahawa Afidavit Menentusahkan Senarai Dokumen saya yang diikrarkan pada 27.11.1998 telah difailkan oleh mereka pada 28.8.1998. Sesalinan yang sama sekarang dikemukakan disini dan ditunjukkan kepada saya bertanda 'SK-1'.

4. Sesalinan Resit No: WT 765900 bertarikh 28.11.1998 juga dikemukakan disini dan ditunjukkan kepada saya bertanda 'SK-2'.

The accused claimed trial to both the charges. The prosecution called a total of seven witnesses in support of its case. They are Dato' Abdullah Hishan bin Hj Mohd Hashim (PW1), the complainant; Ngui Kee Heong (PW2), the Commissioner for Oaths before whom exhs. P8 and P9 were affirmed; Norliza bt Othman (PW3), the senior assistant registrar attached to the Kuala Lumpur High Court; Tan Ghee Phaik (PW4), formerly the deputy registrar attached to the Kuala Lumpur High Court; Inspector Merbin AK Lisa (PW5), the investigation officer in this case; Samirtha a/p Apostler (PW6), an interpreter attached to the Kuala Lumpur High Court and Manoharan a/l Malayalam (PW7), an advocate and solicitor, from the firm of Messrs Karpal Singh & Co, who were solicitors for PW1 in the civil suit. At the close of the case for the prosecution the learned magistrate found that the prosecution had not made out a *prima facie* case and accordingly acquitted and discharged the accused. This appeal is by the prosecution.

***Preliminary Issue***

The complaint in this case was made by Dato' Abdullah Hishan bin Hj Mohd Hashim. The prosecution against the accused was instituted on the sanction of the public prosecutor. One of the objections taken before the learned magistrate is that the court has no jurisdiction to proceed with the charge as

it was not instituted on the complaint of the High Court before which the false declaration was used pursuant to s. 129 of the Criminal Procedure Code ("s. 129") the material parts of which read as follows:

> (1) Except in the case of complaints laid by the Public Prosecutor no Court shall take cognisance –
>
> (a) of any offence punishable under sections 172 to 188 of the Penal Code except with the previous sanction of the Public Prosecutor or on the complaint of the public servant concerned or of some public servant to whom he is subordinate;
>
> (b) of any offence punishable under section 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 or 228 of the Penal Code except with the previous sanction of the Public Prosecutor or when the offence is committed in or in relation to any proceeding in any Court on the complaint of such Court;

The learned magistrate, in relying on *Datuk Mahinder Singh v. PP* [1987] 2 CLJ 39, said in his grounds of judgment at p. 223 of the Appeal Record:

> Jelaslah di sini perkataan **or** bermakna atau ditafsirkan sebagai mana-mana carapun boleh terpakai bergantung kepada macam mana pertuduhan hendak dibawa.
>
> Pihak pendakwaan boleh membawa pertuduhan terhadap OKT dengan cara pertama dengan syarat suatu sanksi bertulis yang terdahulu dikemukakan kepada Mahkamah.

Before me the learned deputy public prosecutor contended that the judgment in *Datuk Mahinder Singh* makes it clear that the opinion advanced by the learned magistrate is correct while learned counsel for the accused said that *Datuk Mahinder Singh* does not express the meaning of s. 129 in articulate terms and maintained the objection that he had raised before the learned magistrate.

I consider it necessary to reproduce the relevant part of the judgment of KC Vohrah J in *Datuk Mahinder Singh* in order to appreciate what it means. His Lordship said this at pp. 40-41:

> 6. If the complainant is not the Public Prosecutor (or the Solicitor General or a Deputy Public Prosecutor) then, in respect of the offences named in s 129(i)(b) and in respect of the abetment of such offences or attempts to commit them, the Magistrate only takes cognizance of such offences in the complaint when, either,
>
> 1) it has the previous sanction of the Public Prosecutor (the Solicitor General or a Deputy Public Prosecutor); or
>
> 2) the complaint is from the Court where the offence was committed in or in relation to any proceeding in that Court.

7. …

8. In regard to the matter that a complaint has to be made by the Court where the offence was committed in or in relation to any proceeding in that Court, clearly it is not correct, as Mr Theivanthiran has argued, to say the complaint of the Court has also to be made to support the previous written sanction of the Public Prosecutor (Solicitor General or a Deputy Public Prosecutor). *To my mind it is an alternative procedure and applies where the offence complained of was committed in a Court or in a proceeding in the Court.* (emphasis added)

To my mind the doubt created in the mind of learned counsel as to the correct opinion expressed in *Datuk Mahinder Singh* is perhaps due to the addition of a semi-colon before the word "or" in para. 6 of the judgment that I have reproduced. The relevant part of s. 129(1)(b) does not have the semi-colon. Punctuation marks in a statute play a critical role in its interpretation. As Abdoolcader SCJ said in *Dato Mohamed Hashim Shamsuddin v. Attorney-General, Hongkong* [1986] 2 MLJ 112 at p. 122:

> The day is long past when the courts would pay no heed to punctuation in any written law (*Hanlon v. Law Society* [1981] AC 124 at pages 197 – 198 per Lord Lowry), and the presence or absence of a comma may be highly significant (*Re Steel (deceased), Public Trustee v. Christian Aid Society* [1979] Ch 218; *Marshall v. Cottingham* [1981] 2 All ER 8).

His Lordship proceeded to say that where two parts of a section are separated by a comma followed by the word "and" then the section must be read disjunctively. In this regard Eusoff Chin SCJ (as he then was) said in *Prithipal Singh v. Datuk Bandar, Kuala Lumpur (Golden Arches Restaurant Sdn Bhd, Intervener)* [1993] 3 MLJ 336 at p. 341:

> We find that Parliament had deliberately inserted a comma after the words 'Federal Territory' and the significance cannot be ignored because without the comma the words 'Secretary General' and 'public officer' must be read conjunctively, but with the comma, these words must be read disjunctively.

Thus the addition of the semi-colon, which has the effect of a full-stop, before the word "or" in para. 6 of the judgment in *Datuk Mahinder Singh*, may go to show that both parts of the sub-section are disjunctive with the result that the offences enumerated therein if committed in or in relation to any proceedings in any court can only be instituted on the complaint of such court. Be that as it may, the part of para. 7 of the judgment which I have emphasised shows that the complaint of the court is only an alternative procedure. That ought to make the position clear. I agree that the complaint of a court as contemplated by s. 129(1)(b) is only an alternative procedure for instituting a prosecution in respect of the offences specified in the sub-section in the sense that a prosecution in respect of such offences may also be instituted with the previous sanction of the public prosecutor. For the removal of doubts I state emphatically that in respect of the offences enumerated in s. 129(1)(b) a prosecution may be instituted on the sanction of the public prosecutor even

when such offences were committed in or in relation to any proceedings in any court. My interpretation of s. 129(1)(b) is based on several reasons. Firstly, the opening words of s. 129(1), that is to say, "Except in the case of complaints laid by the Public Prosecutor no court shall take cognisance –" mean that where the complaint is laid by the public prosecutor the remaining parts of the section become inapplicable. It follows that prosecutions in respect of offences enumerated in s. 129(1)(b) may be instituted on the complaint of the public prosecutor even when they were committed in or in relation to any proceeding in any court. If such prosecutions can be instituted on the mere complaint of the public prosecutor I do not see any reason why there should be a prohibition on such a prosecution being based on his sanction which involves a greater application of the mind than a complaint. Secondly, the absence of a comma before the word "or" separating the two parts of s. 129(1)(b) means that both the parts must be construed conjunctively with the result that both parts are alternatives to the institution of a prosecution in respect of the offences enumerated in the sub-section. Thirdly, and finally, a construction of s. 129(1)(b) in favour of the argument advanced by learned counsel would impinge upon the powers of the attorney general bestowed by art. 145(3) of the Federal Constitution in the following terms:

> The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.

The discretion given to the attorney-general in this provision is unfettered (see *Johnson Tan Han Seng v. PP* [1977] 2 MLJ 66). As Suffian LP said in *Long bin Samat v. PP* [1974] 2 MLJ 152 at p. 158 this provision

> … clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue.

As Gopal Sri Ram JCA, sitting in the High Court, said in *Repco Holdings Bhd v. PP* [1997] 4 CLJ 740 at p. 746:

> It will be seen at once, from a reading of the plain language of art 145(3), that the supreme law, namely the Federal Constitution, has committed to the hands of the Attorney-General the sole power, exercisable at his discretion, to institute, conduct and discontinue criminal proceedings.

Article 4(1) of the Federal Constitution provides that any law passed after Merdeka Day which is inconsistent with the Constitution shall, to the extent of the inconsistency be void. As I said in *Kyohei Hosoi v. PP* [1998] 1 CLJ 1063 at pp. 1070-1071:

It is therefore manifestly patent that the discretion to institute a prosecution is within the exclusive domain of the Attorney-General. That brings into focus the validity of s. 58(2) of the Act which authorises the director general of immigration to sanction the institution of a prosecution. Following the meaning of the word 'institute' considered earlier and the definition of the word 'sanction' in *Black's Law Dictionary* 6th Edn as

> To assent, concur, confirm, reprimand, or ratify. *US v. Tillinghast, DCR* 155 F 2d 279, 283. Approval or ratification.

a sanction to institute a prosecution means to concur in or approve the commencement of a prosecution. The result of s. 58(2) of the Act giving power to, *inter alia,* the director general of immigration to sanction the institution of a prosecution means that his power is parallel to that of the Attorney General. As I said earlier art 145(3) of the Federal Constitution confers this power exclusively on the Attorney General. In the premises that part of s. 58(2) of the Act which empowers the director general of immigration to sanction a prosecution is inconsistent with art 145(3) of the Federal Constitution. As laid down in *Repco* all laws passed by Parliament have to be read subject to the supreme law of the country which is the Federal Constitution. Article 4(1) of the Constitution provides that any law passed which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void. The corollary is that s. 58(2) which empowers the director general of immigration to sanction the institution of a prosecution is void. I would therefore declare s. 58(2) of the Act to be unconstitutional, null and void and of no effect, save to the extent as indicated.

With regard to the position of laws in force prior to Merdeka Day the relevant part of the Federal Constitution that stipulates the manner of making them consistent with the Constitution is art. 162(1) which reads as follows:

> Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modification as may be made therein under this Article and subject to any amendments made by federal or state law.

The relevant part of art. 162 which deals with modifications to be made to an existing law is its cl. (6). It reads as follows:

> Any court or tribunal applying the provisions of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

The phrase "existing law" in the provisions that I have just referred to is defined in art. 160 of the Federal Constitution as:

> … any law in operation in the Federation or any parts thereof immediately before Merdeka Day.

The word "law" itself is defined in the same article as including:

> … written law, the common law in so far as it is in operation in the Federation or any thereof, and any custom or usage having the force of law in the Federation or any part thereof.

In *Surinder Singh Kanda v. Government of the Federation of Malaya* [1962] MLJ 169 the Privy Council held that in the case of a conflict between an existing law and the Constitution, the Constitution must prevail and the court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution as provided by art. 162(6) (see *Aminah v. Superintendent of Prisons, Pengkalan Chepa, Kelantan* [1968] 1 MLJ 92; *Assa Singh v. Menteri Besar, Johore* [1969] 2 MLJ 30; *Yeap Hock Seng v. Minister of Home Affairs, Malaysia* [1975] 2 MLJ 279; *Minister of Home Affairs v. Chu Choon Yong* [1977] 2 MLJ 20; *Government of Malaysia v. Iznan bin Osman* [1977] 2 MLJ 1).

Section 129(1)(b), being part of the Criminal Procedure Code, an exisitng law, must therefore be modified so as not to conflict with art. 145(3) if it can be successfully argued that what it means is that in the case of the offences enumerated in it a prosecution can only be instituted upon a complaint by the court when the offence was committed in or in relation to any proceeding in such court. Thus, even if the interpretation of s. 129(1)(b) as submitted by learned counsel is correct such an interpretation must be modified to make it accord with art. 145(3) with the result that a prosecution for an offence under the section can be instituted by the public prosecutor without the need for a complaint from the court. It follows, therefore, that in either event the interpretation of s. 129(1)(b) is as I have stated earlier.

***The Evidence Adduced Before The Learned Magistrate***

Section 199 of the Penal Code ("the section") under which the accused has been charged reads as follows:

> Whoever, in any declaration made or subscribed by him which declaration any Court, or any public servant or other person, is bound or authorised by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.

The elements that require to be proved in a charge under the section, as stated in *Ratanlal & Dhirajlal's Law of Crimes* 24th edn, vol I at p. 854, are as follows:

1. That the accused made, or subscribed the declaration in question;
2. That a Court of Justice, etc was bound or authorised to receive such declaration as evidence;

3. That the accused made the statement in question contained in such declaration;
4. That such statement was false;
5. That such false statement touched a point material to the object of such declaration;
6. That when making such false statement, the accused knew that it was false, or believed it to be false, or did not believe it to be true.

As the section relates to the making of a false statement it is critical to determine the falsity of para. 2 in order to have a proper appreciation of the evidence adduced by the prosecution. Paragraph 2 as found in both exhs. P8 and P9 reads as follows:

> Saya mengikrarkan afidavit di sini tanpa prasangka untuk menimbulkan bantahan-bantahan fakta bahawa saya bukan orang seperti yang digambarkan dalam tindakan di sini sebagai Defendan.

Accordingly, the contention of the prosecution with regard to what is meant by para. 2, as submitted by the learned deputy public prosecutor in the court below and as appearing at p. 162 of the Appeal Record is as follows:

> Hujah saya melihat kepada P8 dan P9 orang yang digambarkan sebagai Defendan. Defendan dinamakan adalah Sharma Kumari Shukla. Apabila paragraph 2 menyebutkan orang seperti yang digambarkan di sini sebagai Defendan ialah orang yang dinyatakan di dalam dokumen ini ialah Sharma Kumari Shukla. Jadi ini bermaksud perkataan-perkataan saya bukan Sharma Kumari Shukla kerana dalam tuduhan Defendan di dalam kes ini Sharma Kumari Shukla. Ini bermakna beliau menafikan bahawa beliau adalah Sharma Kumari Shukla dan ini adalah satu pernyataan yang palsu.

Thus the prosecution led evidence, both oral and documentary, to show that the accused had held herself out as Sharma Kumari Shukla. The documentary evidence tendered by the prosecution includes exh. P1 which is a letter of offer to the accused by PW1. It is addressed to her as Sharma Kumari Shukla. Exhibits P4, P5 and P6 are memo pad pages of the accused. It carries the legion "from the desk of the Chief Executive Officer Sharma Kumari Shukla" in P4 and "From the desk of Sharma Kumari Shukla" in P5 and P6. Exhibit P7 is the salary voucher of the accused. The particulars there are as follows:

> Name : Sharma Kumari Shukla
> IC No : 5932395
> Salary for the month of : November '96.

She has signed it as the person approving and receiving it. Exhibits P43(b) and P43(c) are the notice of appearance and memorandum of appearance in respect of the civil suit. The material part of exh. P43(b) reads as follows:

> AMBIL PERHATIAN bahawa satu kehadiran telah dimasukkan bagi Sharma Kumari Shukla, Defendan yang tersebut di atas.

The material part of exh. P43(c) reads as follows:

> Masukkan kehadiran untuk Sharma Kumari Shukla, Defendan dalam tindakan ini.

Exhibit P44 is a letter dated 2 October 1999 received by the firm of PW7 from Messrs Bachan & Kartar, solicitors for the accused in the civil suit. The material part of the letter reads as follows:

> Kami merujuk kepada perkara yang tersebut di atas di mana kami mewakili Sharma Kumari Shukla.

Exhibit P38 is a certified true copy of the notes of evidence of the civil suit. Page 62 of the exhibit contains an admission to this effect:

> At this stage to a question from the Court as to whether the name Sharma Kumari Shukla and Sharma Kumari refers to one and the same person in Court hearing, Mr. Gurbachan very kindly makes the concession that they are one and the same.

In his evidence PW1 said that the accused used the name Sharma Kumari Shukla. As he said at p. 26 of the Appeal Record:

> J: OKT selalu menggunakan nama Sharma Kumari Shukla didalam semua komunikasi serta surat menyurat Syarikat GWS dengan pihak yang lain kerana OKT telah memberi gambaran dengan penuh nyata jelas dan benar bahawa beliau adalah Sharma Kumari Shukla.
>
> S: Selain daripada surat-surat komunikasi, dalam surat-surat berkaitan dokumen pejabat, apa nama yang digunakan oleh OKT.
>
> J: Sepertimana yang saya telah jelaskan tadi OKT menggunakan nama Sharma Kumari Shukla sebagai nama resmi bukan sahaja dari segi aspek komunikasi surat menyurat dan dokumentasi tetapi juga dari segi aspek pentadbiran syarikat serta OKT juga ada menggunakan nama Sharma Kumari Shukla di dalam business cardnya dan memo pad syarikat GWS.

And at p. 32 of the Appeal Record:

> S: Dari mana Datuk dapat nama Sharma Kumari Shukla semasa membuat surat tawaran.
>
> J: OKT telah menyuruh saya menggunakan nama Sharma Kumari Shukla kerana OKT menyatakan kepada saya bahawa itu adalah nama OKT yang sebenarnya dan untuk membuktinya kenyataan OKT pada ketika itu, OKT telah menunjukkan kepada saya surat tawaran asal daripada Insas Bhd yang bertarikh November 1993. Pada ketika itu juga OKT masih lagi bekerja di Insas Bhd. Surat Tawaran dari Insas Bhd adalah ini suratnya.

That letter of offer is exh. P11. PW1 was not cross-examined on the exhibits that he produced nor on his oral evidence except that it was put to him that the accused did not ask him to put her name as Sharma Kumari Shukla on exh. P1 which he denied.

PW7 said in evidence that he was present when a bankruptcy notice (exh. P49) was served on the accused. As he said at p. 92 of the Appeal Record:

> J: Pada 16/10/99 Sabtu yang lepas semasa saya hadir bersama kerani saya Encik George Fernandez untuk menyerahkan satu notis kebankrapan terhadap OKT. Kerani saya ada menanya OKT adakah kamu Sharma Kumari Shukla, beliau menjawab ya dan kerani saya mengatakan saya ingin serahkan kepada kamu satu notis kebankrapan dan kerani saya tanya adakah kamu sanggup menerimanya, tertuduh juga menjawab ya. Beliau menerima notis kebankrapan tersebut dan menandatangani sebagai akuan penerimaan notis kebankrapan di belakang dokumen yang diserahkan kepada beliau.
>
> S: Adakah OKT menerima secara peribadi (personally).
>
> J: Tertuduh menerima secara peribadi notis kebankrapan atas nama Sharma Kumari Shukla.

On the other hand the defence submission on the meaning of para. 2 as expressed at p. 135 of the Appeal Record is as follows:

> Further there is no evidence adduced that the statement in paragraph 2 of P8 and P9 is false. It is my submission that in P8 and P9 there was never any statement by the accused denying that she is the Defendant or stating that she is not the Defendant.
>
> If we read P8 at paragraph 2 what she really says is that my name is wrongly described as the Defendant, that my name is Sharma Kumari that's all. Never says that she is not the Defendant. The prosecution having called no evidence to interpret clause 2. Now leaves the duty upon your honor to interpret it.
>
> If the accused wanted to deny being the Defendant she would simply says 'Saya bukanlah Defendan dalam guaman ini'. It is submitted she never says that, that can't be the interpretation or the meaning assigned paragraph 2.

Accordingly, the defence, in order to establish that the accused's name is Sharma Kumari introduced various exhibits. Some of the documents are her identity card (exh. D12), her passport (exh. D13), her birth certificate (exh. D14), her marriage certificate (exh. D15), her driving licence (exh. D16), a letter from the Employees Provident Fund (exh. D17), the warrant of arrest against her (exh. D19), the charge sheet (exh. D20) and a bank statement (exh. D24) which show her name as Sharma Kumari. When these and certain other documents were shown to PW1 he agreed that the accused's name appears on the documents as Sharma Kumari. He also agreed that the accused had signed on exhs. P1 and P11 as Sharma Kumari. Exhibits D30 and D31 are two cheques signed by PW1 in favour of the accused. Exhibit D30 was originally written out in the name of Sharma Shukla Kumari and later the name Shukla had been cancelled. Exhibit D31 was originally written in the name of Sharma Kumari Shukla with the word Shukla cancelled. In cross-

examination PW1 said that he was asked by the accused to cancel the name Shukla. In his re-examination PW1 was questioned on exhs. D30 and D31. The questions asked and his answers as at p. 54 of the Appeal Record run as follows:

S: Siapa yang tulis cek.

J: Saya.

S: Adakah tandatangan kamu tandatangan semasa dipotong.

J: Ya.

S: Mengenai latarbelakang cek ini kenapa ia ditulis dan dipotong.

J: Pertama, cek ini adalah sebenarnya pada waktu itu OKT memohon pertolongan kewangan daripada saya. Saya telahpun jelaskan di dalam Mahkamah Sivil 2 tentang mengapa cek ini diberikan kepada OKT kerana ia dianggap sebagai satu pinjaman sebab dia perlu wang pada waktu itu.

Kedua, tentang nama, cek ini dikeluarkan pada tahun 1995 dan waktu itu OKT belum kerja di GWS dan daripada waktu dulu lagi saya diberitahu oleh OKT bahawa nama beliau adalah Sharma Kumari Shukla tapi OKT memberitahu saya bahawa nama yang digunakan di dalam bank accountnya bukanlah nama penuh tetapi nama pendek setakat Sharma Kumari sahaja. Oleh itu beliau suruh saya membuat pembatalan kepada cek itu sungguhpun beliau mengakui kepada saya bahawa nama resminya ialah Sharma Kumari Shukla.

***The Grounds Of Judgment Of The Learned Magistrate***

The learned magistrate has set out correctly the six ingredients to be proved by the prosecution. He said that the prosecution has proved the first, second and third ingredients with which I agree. However, he held that the prosecution has failed to prove the fourth, fifth and sixth ingredients. In explaining why he had found that the prosecution has not proved the fourth ingredient he said at pp. 214-216 of the Appeal Record as follows:

Berhubung dengan intipati keempat pula, setelah saya meneliti serta menimbang keseluruhan fakta kes, saya berpandangan bahawa pihak pendakwaraya telah gagal untuk membuktikan intipati ini sama sekali terhadap kedua-dua tuduhan atas alasan-alasan berikut. Ekshibit P8 dan P9 dan khususnya P8 adalah afidavit jawapan defendan (tertuduh) terhadap Saman Dalam Kamar yang difailkan oleh plaintiff.

Ekshibit P8 yang diikrarkan oleh tertuduh yang berbunyi:

… saya bukan orang seperti yang digambarkan dalam tindakan di sini sebagai defendan.

Manakala Ekshibit P8T yang diikrarkan oleh tertuduh dalam Bahasa Inggeris berbunyi:

… I am not the person as described in the action herein as the Defendant.

Ekshibit P9 pula berbunyi:

> … saya bukan orang seperti yang digambarkan dalam tindakan di sini sebagai Defendan.

Manakala Ekshibit P9T pula yang berbunyi dalam Bahasa Inggeris:

> … I am not the person as described in the action herein as the Defendan.

Jika diteliti kedua-dua Ekshibit P8 dan P9 dan dibaca bersama kedua versi Bahasa Inggeris, saya berpandangan bahawa pernyataan yang dibuat oleh tertuduh bukanlah satu pernyataan palsu. Tertuduh tidak menafikan beliau adalah defendan di dalam kes sibil tersebut tetapi hanya menimbulkan bantahan-bantahan fakta matan (material) bahawa beliau bukan orang seperti yang digambarkan dalam tindakan di sini sebagai Defendan. Dalam lain perkataan, tertuduh menyatakan bahawa nama beliau telah disalah huraikan oleh pihak Plaintif di dalam tindakan sibil tersebut iaitu Sharma Kumari Shukla sebagai Defendan di dalam tindakan sibil tersebut. Adalah juga perlu dijelaskan di sini bahawa pihak Plaintiflah yang menamakan Sharma Kumari Shukla sebagai defendan di dalam kes sibil tersebut dan bukanlah oleh tertuduh sendiri.

Tambahan pula, tertuduh telah menjawab afidavit-afidavit tersebut sepertimana dalam perenggan 3, 4, 5, 6 dan 7 Ekshibit P8 dan juga perenggan 3 dan 4 Ekshibit P9 dan ini jelas ternyata beliau tidak menafikan beliau adalah defendan di dalam kes sibil tersebut. Pada hemat saya representasi yang dibuat oleh tertuduh dalam perenggan-perenggan tersebut tadi adalah cukup menonjol dan jelas bahawa tertuduh tidak menafikan bahawa dia adalah defendan dan oleh kerana itulah dia telah menjawab perenggan-perenggan yang disebutkan tadi terhadap representasi yang dibuat oleh Plaintif di dalam afidavitnya bertarikh 13 Oktober 1998 di dalam kes sibil tersebut.

Dalam lain perkataan tertuduh (defendan) telah 'submit' kepada tindakan di dalam kes sibil tersebut kerana seandainya tertuduh bukanlah defendan maka dia tidak mempunyai sebarang kewajipan di sisi undang-undang untuk menjawab afidavit Plaintif.

Adalah menjadi rukun amalan yang diterima pakai di dalam kes-kes keterangan afidavit sepertimana yang digariskan dengan nyata di dalam kes *Overseas Investment Pte Ltd v. Anthony William O'Brien & Another* [1988] 3 MLJ 332 di mana YA Hakim Shankar J berpandangan dalam bahasa asal yang berbunyi:

> Where a case is to be decided on a contest of affidavits, the rule is that material allegations which are not contradicted are deemed to be admitted.

Kes *Overseas Investment* ini telah disahkan selanjutnya oleh Mahkamah Rayuan di dalam kes *Ng Hee Thoong & Another v. Public Bank Berhad* [1995] 1 MLJ 281.

Tambahan pula, defendan juga telah menyatakan di dalam perenggan 3 dan 4 Ekshibit P8 bahawa dia akan membangkitkan satu isu bantahan awal kelak di atas kelewatan plaintif menyerahkan afidavitnya kepada Defendan.

Dalam lain perkataan, perbuatan defendan untuk menjawab kepada afidavit plaintif jelas menunjukkan beliau adalah defendan dalam kes sibil tersebut tetapi beliau telah disalah huraikan nama oleh pihak plaintif.

And at p. 218 of the Appeal Record he added:

Persoalan di dalam fakta ini bukan sebenarnya siapakah orang yang dipertikaikan tetapi adalah apakah **nama** sebenar defendan.

With regard to the meaning of paragraph 2 the learned magistrate has said that the accused had merely stated that her name had been wrongly described (disalah huraikan) by PW1 in the civil suit. He added that the existence of paras. 3, 4, 5, 6 and 7 in exh. P8 and paras. 3 and 4 in exh. P9 clearly show that the accused has not denied that she is the defendant as, by including those paragraphs, she had submitted herself to the jurisdiction of the court. He said that these paragraphs being in reply to the affidavit affirmed by PW1 on 13 October 1998 show that the accused has not denied that she is not the defendant. He said that the steps taken by the accused show that she is the defendant in the civil suit except that her name had been wrongly described. He thus concluded that the fourth ingredient, that is to say, that para. 2 is false, had not been proved by the prosecution. He also said that this ingredient had been destroyed by the evidence of PW2 and PW4 who had testified on the official name of the accused. The learned magistrate then expressed his views on the fifth and sixth ingredients at pp. 217-218 of the Appeal Record as follows:

Saya juga berpandangan bahawa oleh kerana intipati keempat gagal dibuktikan oleh pihak pendakwaraya, maka secara otomatis intipati kelima iaitu pernyataan palsu tersebut menyentuh mengenai sesuatu perkara yang mustahak kepada maksud akuan yang dibuat atau digunakan itu, juga gagal dibuktikan. Ini adalah disebabkan jika tiada keterangan langsung yang menunjukkan pernyataan ini adalah palsu bagaimanakah pula ianya dapat menyentuh mengenai sesuatu perkara yang mustahak kepada maksud akuan yang dibuat atau digunakan itu.

Berhubung dengan intipati terakhir pula, iaitu tertuduh membuat pernyataan palsu dengan mengetahui bahawa ianya adalah palsu atau mempercayai sebagai palsu atau yang ia tidak mempercayainya sebagai benar. Untuk membuktikan intipati ini, keadaan minda (state of mind) dan niat OKT adalah menjadi ukuran bagi membuktikan bahawa OKT mengetahui ianya adalah palsu atau mempercayai sebagai palsu atau yang ia tidak mempercayainya sebagai benar. Jika sekiranya intipati keempat tidak dapat dibuktikan oleh pihak pendakwaraya, bagaimana pula ianya dapat membuktikan keadaan minda OKT pada masa OKT membuat akuan-akuan berkenaan.

### *The Findings Of This Court*

I now proceed to consider whether the learned magistrate was correct in holding that the prosecution has failed to prove the fourth, fifth and sixth ingredients.

**(a) The Fourth Ingredient – That The Declaration Made By The Accused in Paragraph 2 Is False**

The prerequisite to a finding of whether para. 2 is false or not is a determination of what it means. A failure to make such a preliminary finding, or a failure to do so correctly, will result in an erroneous and misguided approach to an assessment of proof of this ingredient. The learned magistrate has said in his grounds of judgment that the accused had merely said in para. 2 that her name had been wrongly described (disalah huraikan) by PW1 in the civil suit; that she had not denied that she is the defendant and that the issue for determination is:

> Persoalan di dalam fakta kes ini bukan sebenarnya siapakah orang yang dipertikaikan tetapi adalah apakah **nama** sebenar defendan.

Thus, the first task before me is to ascertain what the accused has said in para. 2 which reads as follows:

> Saya mengikrarkan afidavit di sini tanpa prasangka untuk menimbulkan bantahan-bantahan fakta bahawa saya bukan orang seperti yang digambarkan dalam tindakan di sini sebagai Defendan.

Its English translation as in exh. P8T is this:

> I affirm the affidavit herein without prejudice to raise objections to the fact that I am not the person as described in the action herein as the Defendant.

In determining what para. 2 means it is not necessary to call evidence on its meaning as contended by learned counsel for the accused. It is the function of the court to ascertain what the accused meant by the words used. In this regard I refer to *Goh Gok Hoon v. Abdul Hamid & Anor* [1967] 1 MLJ 36 where Ismail Khan J (as he then was) said at pp. 39-40:

> It is a cardinal rule in the interpretation of documents that the intention of the parties must be gathered from the written instrument itself.
>
> > The function of the court is to ascertain what the parties meant by the words which they have used; to describe the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being for the purpose of the interpretation equivalent to the intention. It is not permissible to guess at the intention of the parties and substitute the presumed for the expressed intention.
>
> – see *Halsbury*, vol II, 3rd edn, p. 382.

I also refer to *Great Western Railway v. Bristol Corporation* [1918] 87 LJ Ch 414 where Lord Shaw said:

> … one hears much use made of the word 'intention', but courts of law when on the work of interpretation are not engaged upon the task or study of what parties intended to do, but of what the language which they employed showed that they did; in other words, they are not constructing a contract on the lines of what may be thought to have been what the parties intended, but they are construing the words and expressions used by the parties themselves. What do these mean? That when ascertained is the meaning to be given effect to, the meaning of the contract by which the parties are bound. The suggestion of an intention of parties different from the meaning conveyed by the words employed is no part of interpretation, but is mere confusion.

The first observation to be made is that the documentary evidence tendered by the defence during the cross-examination of PW1 and the oral evidence of PW2 make it clear beyond doubt that the official name of the accused is Sharma Kumari. In any event this fact is implicit in the case for the prosecution itself as evidenced by the warrant of arrest of the accused, the charge sheet against her and Lampiran A1 (exh. P8) and Lampiran A2 (exh. P9), incorporated in the two charges, which set out her name as Sharma Kumari. However, she has been cited in the civil suit as the defendant in the name of Sharma Kumari Shukla. Paragraph 2 is in relation to this name. It is with regard to this name that she has stated that "… I am not the person as described in the action herein as the defendant." As there is no dispute regarding her official name what the accused is saying in para. 2 is that she is not the person described as Sharma Kumari Shukla in the civil suit as the defendant. She is not denying that she is not the defendant but that the description of Sharma Kumari Shukla as the defendant does not refer to her. In other words she is denying that her name is Sharma Kumari Shukla as stated in the civil suit. As her official name is, undisputably, Sharma Kumari she is denying that she is known by the alternative name of Sharma Kumari Shukla. I say this because the accused is not saying that she has not been sued in her official name but that the alternative name assigned to her does not refer to her. It is therefore my view that if the prosecution proves that the accused is also known by the name of Sharma Kumari Shukla then the averment in para. 2 by the accused would be false. I pause to add that the legal effect of suing a person by his alternative name or alias is not a matter for consideration in this case.

I have set out in an earlier part of the judgment the unchallenged evidence led by the prosecution, both oral and documentary, to show that the accused is known by the name of Sharma Kumari Shukla. The fact that her official name is Sharma Kumari is irrelevant. In fact learned counsel for the accused had said during the hearing of the civil suit that the defence concedes that the accused is known as Sharma Kumari Shukla as that name and the name Sharma Kumari refer to the same person. That amounts to an admission. The averment by the accused that she is not the person described as Sharma Kumari Shukla in para. 2 has therefore been proved by the prosecution to be a false declaration.

The judgment of the learned magistrate is anchored on a misinterpretation of para. 2. Thus his finding that the accused had only stated that her name had been wrongly described (disalah huraikan) and that she has not denied that she is the defendant in the civil suit cannot be sustained. The further finding by him that the question involved in the case is the real name of the accused cannot also be sustained. It was perhaps to answer this question that he made a finding that PW1 knew the accused as Sharma Kumari only and not as Sharma Kumari Shukla or Sharma Shukla Kumari way back from 1995. In arriving at this conclusion he said in his grounds of judgment at pp. 200-201 of the Appeal Record:

> SP1, semasa diperiksa balas oleh peguambela atas soalan-soalan berikut mengatakan:
>
> S: Bersetuju nama Shukla dibatalkan (dalam D30 & D31)
>
> J: Setuju
>
> Apabila diperiksa semula oleh pendakwaraya;
>
> S: Mengenai latar belakang cek ini kenapa ia ditulis dan dipotong.
>
> J: Pertama …
>
> Kedua, tentang nama, cek ini dikeluarkan pada tahun 1995 dan waktu itu OKT belum kerja di GWS dan daripada waktu dulu lagi saya diberitahu oleh OKT bahawa nama beliau adalah Sharma Kumari Shukla tapi OKT memberitahu saya bahawa nama yang digunakan di dalam bank accountnya bukanlah nama penuh tetapi nama pendek setakat Sharma Kumari sahaja. Oleh itu beliau suruh saya membuat pembatalan kepada cek itu sungguhpun beliau mengakui kepada saya bahawa nama resminya ialah Sharma Kumari Shukla.
>
> Jika ditelitikan keterangan SP1 di atas, saya telah membuat satu inferen bahawa SP1 telahpun mengetahui nama OKT sebagai Sharma Kumari sahaja dan bukan sebagai atau Sharma Kumari Shukla atau Sharma Shukla Kumari sejak tahun 1995 lagi. Saya juga berpandangan bahawa pihak bank tidak akan menerima sebarang nama pendek tetapi akan hanya berpandukan kepada butiran diri sahaja di dalam kad pengenalan ataupun paspot bagi membuka sebarang akaun bank. Cuma nama pendek hanya terpakai dan hanya dicatat kepada apa-apa kemudahan Kad Kredit atau ATM sahaja sebagai pilihan untuk meringkaskan perkataan pada nama di atas kad-kad tersebut. Tambahan pula, seseorang pekerja tidak boleh melantik atau mencadangkan untuk dilantik apa-apa jawatan sewenang-wenangnya dari majikan. Persetujuan dari majikan serta penerimaan syarat-syarat pekerjaan juga diambilkira. Keterangan SP1 berhubung isu-isu di atas menimbulkan kekeliruan serta keraguan pada fikiran serta minda saya.
>
> Tambahan pula, adalah menjadi kewajipan serta tanggungjawab SP1 untuk memeriksa apakah nama sebenar OKT pada tahun 1995 lagi dan SP1 mempunyai peluang untuk berbuat demikian sehingga 23 Disember 1997 iaitu sebelum mengeluarkan writ saman terhadap OKT. SP1 telah gagal menjalankan

suatu pengamatan yang cermat serta berhati-hati untuk memastikan apakah nama sebenar OKT selaras dengan kad pengenalan/paspot OKT sebelum mengeluarkan kedua-dua cek yang ditandakan sebagai D30 dan D31 mahupun semasa menyempurnakan writ saman terhadap OKT.

Faktor-faktor di atas menimbulkan keraguan serta kekeliruan yang berligar pada fikiran serta minda saya dan bolehlah dirumuskan bahawa tingkahlaku serta kelakuan saksi (demeanour) SP1 semasa menjawab soalan peguambela adalah berbentuk 'mengelak' (evasive) daripada menjawab soalan-soalan yang dikemukakan dan tidak menjawab terus kepada soalan-soalan yang ditanya oleh pegumbela. Adakah keterangan SP1 di Mahkamah boleh dipercayai amatlah diragui oleh saya.

The views expressed by the learned magistrate on the credibility of PW1 warrant serious consideration as he is the principal witness for the prosecution. He has made an inference that PW1 knew the accused's name only as Sharma Kumari and not as Sharma Kumari Shukla or Sharma Shukla Kumari since 1995 based on the explanation offered by PW1 in his re-examination as to why he had altered the name of the accused in exhs. D30 and D31. This finding is indeed strange and baffles me as it is totally unsupported by the evidence which formed the basis of this finding. The evidence, as reproduced by the learned magistrate, shows that since 1995 PW1 had been told by the accused that her name is Sharma Kumari Shukla. PW1 said that the accused asked him to alter her name in exhs. D30 and D31 as the name she had used in her bank account was not her full name but only the shortened name of Sharma Kumari though she admitted at that time that her official name is Sharma Kumari Shukla. By no stretch of imagination can it be said, or even suggested, that this evidence supports the inference that PW1 knew the accused only as Sharma Kumari since 1995. This unwarranted and unjustified finding by the learned magistrate compels me to conclude that he took this stand to support his incorrect interpretation of para. 2. The further opinion expressed by him that a bank would only accept a name as in the identity card though a shorter name could be used in credit cards indicates an attempt to bolster up his earlier finding. There is no evidence on record to support this opinion. Thus the learned magistrate's view that a bank would only accept a name as in the identity card is calculated to support the finding that PW1 knew the accused as Sharma Kumari. His view that a shorter name could be used in credit cards is perhaps an attempt to offer an explanation for the accused in the judgment as to why her name appears in her credit card (exh. P47) as Sharma K Shukla, which, if left unexplained, would support the prosecution case that she is known as Sharma Kumari Shukla. The facts upon which the findings have been made are not notorious enough to be taken judicial notice of nor are they matters that can be presumed within the meaning of s. 114 of the Evidence Act 1950. It is settled law that a judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts (see *Low Moh and Anor v. PP* [1954] MLJ 14; *Lee Seow Kuan v. R* [1940] MLJ 211). In *PP v. Lee Ee Teong* [1953] MLJ 244 Thomson J (as he then

was) said that it is not open to any judge or magistrate to import his personal knowledge into a criminal trial so as to help out evidence for a party which would otherwise be inadequate to support a verdict. In the circumstances the inescapable conclusion is that the matters that I have referred to were brought on record in order to lend credence to the finding that PW1 knew the accused only as Sharma Kumari since 1995. Furthermore, the learned magistrate has castigated PW1 for having failed in his duty to check the real name of the accused before commencing the civil suit and for failing to check her real name before issuing exhs. D30 and D31. He ought to have been aware, as even the most uninitiated would be, that PW1 was not on trial for not having used the official name of the accused in the civil suit and the cheques. Neither was there any issue before the learned magistrate as to whether PW1 ought to have taken steps to ascertain the official name of the accused. I am therefore unable to comprehend why the learned magistrate took PW1 to task for not having ascertained the accused's real name. I can only speculate that it was motivated by a desire to add legal colour to a judgment that is otherwise devoid of any judicial flavour. The conclusion by the learned magistrate that by virtue of the factors that he had enumerated the evidence of PW1 is doubtful cannot therefore be supported. It is a view expressed to weaken the case for the prosecution by striking down its principal witness and I reject it totally.

With regard to the credibility of PW7 the learned magistrate outlined the evidence given by him in his grounds of judgment and said at p. 210 of the Appeal Record:

> Adalah rumusan saya setelah meneliti keseluruhan keterangan yang telah dikemukakan oleh SP1 sehingga SP6, saya berpandangan bahawa khususnya keterangan lisan oleh SP2 dan SP4 telah sama sekali memusnahkan dan menghancurkan keseluruhan kes pendakwaan. SP7 hanyalah dipanggil oleh pendakwaan untuk semata-mata bagi mengisi segala lompang yang besar/matan (material gap) hasil daripada keterangan mantap dan cukup menyakinkan oleh SP2 dan SP4 dan SP7 juga turut dipanggil untuk menyokong sepenuhnya kes pendakwaan.
>
> Dalam menimbangkan keterangan yang dikemukakan oleh SP7 di Mahkamah, saya haruslah menjalankan suatu pengamatan yang cermat serta berhati-hati dalam menerima keterangan saksi ini atas alasan SP7 adalah salah seorang peguambela yang mewakili (SP1) dan mempunyai kepentingan di dalam kes ini.
>
> Saya telah mendengar dan memerhatikan tingkah laku (demeanour) SP7 dan saya dapati beliau telah mementingkan kepentingan anakguamnya daripada kepentingan keadilan. Ini boleh diperhatikan semasa SP7 telah menunjukkan percanggahan serta perbezaan di dalam Ekshibit P45B dan P46B khususnya kepada perenggan 2. Adalah kesimpulan saya bahawa yang menjadi perkara asas kesalahan ialah afidavit P8 dan P9 dan bukanlah afidavit P45B dan P46B. Oleh yang demikian ianya tidak perlu diambilkira oleh Mahkamah dalam mencapai keputusan.

The learned magistrate has said that he has to exercise due care and attention in accepting the evidence of PW7 as he is one of the counsel representing PW1 in the civil suit and therefore has an interest in this case. This view flows from an improper understanding of the role of the legal profession in the administration of justice. An advocate and solicitor cannot be considered as having an interest in a case by the mere fact that he is the solicitor in a case. As I said in *Alliedbank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 6 MLJ 1 at pp. 30-31:

> The judgment of the Court of Appeal in *Bearmans Ltd v. Metropolitan Police District Receiver* [1961] 1 All ER 384 leans strongly in favour of the view that there must be a real likelihood of bias before the maker of a statement can be said to be a person interested. The materiality must be substantial. Thus, in *The estate of Powe, decd* [1956] P 110, Sachs J refused to exclude an account of an interview with a testator prepared by a solicitor who might have benefitted from the success of the action to the extent of being instructed to do probate work. In *Wentworth v. Rogers (No 10)* [1987] 8 NSWLR 398, it was held that a solicitor recording instructions is not a person interested. I agree with this view wholeheartedly as a solicitor is an officer of the court and his role when representing a client is to ensure that justice is done irrespective of whether the outcome of the proceeding is in favour of his client or not.

Thus, the learned magistrate ought to have identified evidence from the testimony of PW7 to show that there was a strong likelihood of him being biased before embarking on the premise that he has an interest in the case. In concluding that PW7 is more interested in his client's interest than in the interests of justice, an indeed serious finding to make against an advocate and solicitor, the learned magistrate said that this is demonstrated by PW7 pointing out the difference in exhs. P45B and P46B especially para. 2. The relevant part of the evidence of PW7 in this regard as at p. 86 of the Appeal Record is as follows:

> S: Antara 2 afidavit ini dan afidavit-afidavit yang lain dirujuk semalam, ada apa-apa perbezaan.
>
> J: Ada. Bagi P45A & P45B, saya ingin rujuk khususnya perenggan 2 Afidavit OKT di mana beliau menyatakan seperti berikut.
>
> > Saya mengikrarkan afidavit di sini tanpa prasangka untuk menimbulkan bantahan-bantahan fakta bahawa saya bukan orang seperti yang digambarkan dalam tindakan di sini sebagai Defendan.
>
> Tetapi di dalam P46B, khususnya tajuk dalam Mahkamah Tinggi S2-22-594-97 nama plaintif ialah Dato Abdullah Hishan b. Hj. Mohd Hashim dan Sharma Kumari adalah defendan.
>
> Tetapi apa yang dideposkan oleh beliau didalam para pertama adalah seperti berikut:

> Para (1) Saya adalah defendan dalam tindakan ini tetapi bukan dinamakan seperti diatas. Inilah percanggahan dan perbezaan saya dapati dalam kedua-dua afidavit yang diikrarkan oleh OKT yang difailkan di Mahkamah Tinggi Sibil 2.

It will be observed that PW7 pointed out the difference in the two affidavits upon being asked to do so. I am unable to see anything wrong with that. That cannot, by any standards, be construed to mean that PW7 is more interested in his client's interest than in the interests of justice. The position, to my mind, ought to be the reverse. Upon being asked it would have been wrong for PW7 to abstain from pointing out the difference in the two affidavits. The learned magistrate also said that after the case for the prosecution had been totally destroyed by the evidence of PW2 and PW4, PW7 was merely called by the prosecution to fill in the gaps left by the evidence of the two witnesses. This view has no legal basis. It is the duty of the prosecution to call additional evidence when it feels that the evidence it has adduced has been shaken. To reject such evidence on the ground that it has been adduced merely to fill in gaps in the prosecution case is an attempt to go beyond judicial bounds. It is tantamount to saying that admissible evidence of probative value adduced by the prosecution has been brought on record to bolster the prosecution case. That, as is obvious even to the man on the street, is precisely the function of the prosecution. To look upon such evidence with suspicion without any basis can be viewed as an attempt to embroider a finding to be made. The flimsy grounds on which the learned magistrate has cast doubts on the credibility of PW7 leads me to conclude that he was bent on rejecting any evidence favouring the prosecution.

In the circumstances it is my view that the learned magistrate has impugned the credibility of PW1 and PW7 on wrong principles. Their evidence on the issues to be proved has been unchallenged and ought to have been accepted. In my opinion a finding on the credibility of a witness must be made with caution. A witness should not be discredited merely to suit the mind of a presiding officer in his pursuit to obtain a particular verdict.

**(b) The Fifth Ingredient – That Such Statement Touched A Point Material To The Object Of Such Declaration**

The learned deputy public prosecutor submitted that para. 2 is material because if the court hearing the civil suit accepts the averment in the paragraph then the very intention of that suit will be frustrated. In that event, he said, the judgment given by the court in the civil suit cannot be enforced against the accused. In his reply learned counsel for the accused said that no evidence was led by the prosecution to prove the application in respect of which exhs. P8 and P9 were filed. He said that only if there is such evidence can the court conclude whether it was in reference to a point material to its object. He added that exhs. P8 and P9 were never used in the trial of the civil suit and that the

question of the name of the accused "… was never raised in the trial or before or after for determination …." On the contrary, he said, the issue of her name had been abandoned with the result that this ingredient has not been proved.

In my opinion it is necessary, in determining whether this ingredient has been proved, to first appreciate that the offence under the section consists only of the making of a declaration where a false statement is made. This is supported by the words "Whoever, in any declaration made or subscribed by him … is bound or authorised by laws to receive as evidence …" in the section. The reference is to the making of a declaration which is receivable as evidence. In other words, the declaration need not have been used in order to attract the sanction of the section. Of course if the declaration is not receivable as evidence it does not come within the purview of the section as illustrated by *Velumailum v. PP* [1947] MLJ 152. An affidavit is a declaration within the meaning of the section as it is receivable as evidence of the fact declared therein pursuant to O. 41 of the Rules of the High Court 1980 ("RHC"). Thus it is only necessary for the prosecution to prove that a declaration, that is to say, exhs. P8 and P9, were made by the accused. Therefore there is no requirement to show that exhs. P8 and P9 were used during the hearing of the civil suit. The use of the declaration, as will be explained shortly, is only an alternative mode of establishing this ingredient.

This ingredient requires proof to show that the false statement touched a point material to the object of the declaration. Proof of materiality, as *Dr Sir Hari Singh Gour's Penal Law of India* 10th edn, vol 2 says at p. 1688:

> … is a question of fact dependent upon the object of the declaration.

The object of the declaration can be gathered, as stated in the section, from "… the object for which the declaration is made or used …" It follows that the object of the declaration can be determined from the very making of the declaration itself or from the manner in which it is used. The significance of the use of a declaration to a charge under this section is therefore clear. It is just another mode allowed by the section to establish that the false statement touched a point material to the object of the declaration. A determination of the object of a declaration from its mere making is a reference to its contents. Consequently, if the materiality of the false statement can be discerned from the declaration itself, that is to say, from its contents, then it is unnecessary for the prosecution to lead evidence on its use as it is only another mode of ascertaining the object of the declaration and is therefore superfluous. Such evidence will also not be available in cases where the declaration has not been used after it had been made. The result is that if the object of the declaration in this case can be ascertained from its contents itself then it is unnecessary for evidence to be adduced to prove the application in respect of which exhs. P8 and P9 were filed. I shall therefore consider whether para. 2 touches any point material to the object for which exhs. P8 and P9 were made. It must

first be observed that para. 2 is merely an extension of what the accused has pleaded in para. 1 of the statement of defence (exh. D40) in respect of the civil suit. It reads as follows:

> Defendan menafikan bahawa dia adalah orang yang dinamakan sebagai Defendan dan Plaintif diperlukan membuktikannya dengan tepat dan terperinci. Defendan memfail Pembelaan di sini tanpa prasangka untuk menimbulkan satu bantahan atas isu ini.

Paragraphs 3, 4, 5, 6 and 7 of exh. P8 and paras. 3 and 4 of exh. P9 have the effect of the accused submitting herself to the jurisdiction of the court thereby nullifying para. 1 of the statement of defence. But para. 2 negates such a submission as it renders the remaining parts of exhs. P8 and P9 to which I have just referred conditional by virtue of the reservation of the right to raise the objection relating to the accused's name. Paragraph 2 has therefore been inserted to qualify the object for which exhs. P8 and P9 were affirmed. To that extent the false statement in para. 2 touches a point material to the object for which exhs. P8 and P9 were made. It is therefore unnecessary for the prosecution to adduce evidence to prove the application in respect of which exhs. P8 and P9 were filed. Even if it can be argued that there must be evidence to show that the accused had used exhs. P8 and P9 to facilitate a determination of the materiality of para. 2 then the fact that she had filed them, which has been proved, is sufficient to establish that fact on the facts of the case with the same result as stated earlier. The effect of para. 2, as it stands without having been corrected, is that the accused has reserved the right to raise the objection relating to her name at any stage of the proceedings. She is entitled to do this by O. 32 r. 13(1) of the RHC which reads as follows:

> (1) Any party –
>
> (a) filing an affidavit intended to be used by him in any proceedings in Chambers; or
>
> (b) intending to use in any such proceedings any affidavit filed by him in previous proceedings,
>
> must give notice to every other party of the filing or, as the case may be, of his intention to do so.

In this context the argument of learned counsel that the accused had abandoned the objection relating to her name may be relevant. This aspect of the defence submission will be considered under the next ingredient. This ingredient has therefore been proved.

**(c) The Sixth Ingredient – That When Making Such False Statement, The Accused Knew That It Was False, Or Believed It To Be False, Or Did Not Believe It To Be True**

The fact that a person, when making a false statement, knew or believed it to be false raises the question of his intention. This is because a person knowingly making a false statement does so intentionally (see *Dr Sir Hari Singh Gour's Penal Law of India* 10th edn, vol 2, p. 1621). There must have been a deliberate intention to make the false statement. As *Ratanlal & Dhirajlal's Law of Crimes* 24th edn, vol 1 says at p. 853:

> There must be a deliberate false statement.

The deliberate intention with which the accused made the false statement is amply supported by the evidence that I have reproduced when dealing with the fourth ingredient. It is unnecessary for me to repeat them here. That the statement was made deliberately can also be seen from the fact that it is a follow-up of what is contained in para. 1 of the statement of defence. Furthermore, as para. 2 was prepared by the accused's solicitor it was made with legal advice. It is therefore a statement made with careful consideration. The materiality of para. 2 can also be taken into consideration in arriving at the intention with which it was made because if it is not material it might well attribute the statement to indifference or carelessness on the part of the accused (see *Dr Sir Hari Singh Gour's Penal Law of India* 10th edn, vol 2, p. 1621). I have already explained the materiality of para. 2 when dealing with the fifth ingredient. This goes to show that the accused made the statement deliberately.

The remaining matter for consideration is the effect of para. 2 in the light of certain steps taken by the accused, in particular, her filing of the notice of appearance (exh. P43(b) and the memorandum of appearance (exh. P43(c)) and the concession made by her, through her counsel, regarding her name during the hearing of the civil suit. This, as learned counsel submitted, means that the issue regarding her name has been abandoned with the result that the accused has not committed any offence. In answer to this it must first be observed that exhs. P8 and P9 were affirmed after exhs. P43(b) and P43(c) were filed, thereby nullifying the effect of the two notices, and the concession regarding her name was made after she had been charged. As the offence under the section is complete when the declaration containing the false statement was made these steps do not affect its criminality unless, as *Ratanlal & Dhirajlal's Law of Crimes* 24th edn, vol 1 says at p. 853:

> Statements made in a reckless and haphazard manner, though untrue in fact, do not constitute any offence when the person making them immediately admits the mistake and corrects them.

The evidence on record does not show that the accused took any steps, immediately or soon thereafter, to admit that para. 2 is a mistake. The police report (exh. P10) against her was lodged on 11 December 1998. The charges (exh. D20) were preferred against her on 16 March 1999. The concession regarding her name was made at the hearing of the civil suit on 16 August 1999 after the criminal trial had commenced. The concession was not made immediate enough so as to treat para. 2 as one made recklessly and haphazardly. In the circumstances the concession made by the counsel only amounts to an admission of the offence and may be of value only as a mitigating factor, if found guilty. This ingredient has therefore been proved by the prosecution.

I was therefore satisfied that the prosecution had made out a *prima facie* case in respect of both the charges when it closed its case. Accordingly, I ordered that the accused be called upon to enter her defence on both the charges.

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